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IN THE COURT OF APPEALS OF KENTUCKY
APPEAL FROM THE JOHNSON CIRCUIT COURT.
HON. J. F. BAILEY, JUDGE.

MITCHELL CANTRELL, ET AL.,
Plaintiffs-Appellants,

vs.

LESTER ADAMS, ET CET., ET AL.,
Defendants-Appellees.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW THE DECISION OF THE COURT OF APPEALS OF KENTUCKY, IN THIS CASE.

The plaintiffs-appellants, having this day presented to the Chief Justice of the Court of Appeals of Kentucky, their petition for appeal herein, their assignment of errors, and their appeal and supersedeas bond, come now and file this their statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction to entertain a direct appeal in this case, to review the final order, judgment and decision of the Court of Appeals of Kentucky in this case, and the basis upon which they contend that said court should exercise such jurisdiction herein.

(A) The Facts

On May 4, 1944, there was held, in Johnson County, Kentucky, an election to decide one question only:

Shall spirituous, vinous or malt liquors be thereafterward sold in Johnson County, for a period of three years?

The returns from said election, as certified by defendants-appellees, who constitute the Board of Election Commissioners for that county, showed that those opposed to the sale of liquor therein, for said period, had prevailed in said election by a majority of 1313 votes, over those favoring such sale.

Before the date of said election, the Congress of the United States had passed the Selective Service Act, by which, in substance it was provided, that thro certain processes, administrative in character, certain persons who were qualified, legal voters in every locality in the United States, including Johnson County, Kentucky, should be selected for, and drafted into service in the armed forces of the United States, and should be removed from their places of abode and barracked in other places, where they were not legal, qualified voters.

Thro the operation of said Selective Service Act, there had been, at the time of said election, drafted into the said armed forces, 2700 legal, qualified voters of Johnson County, Kentucky, including appellants, neither of who was given any right to express his sentiment on the question presented at said election.

The absence of each of such persons, from their voting places was involuntary; and each of them, had he been present, had the right to vote at said election. No provision whatsoever, was made to cast or receive their suffrages.

(B) The Sort of Elections, Required by the Constitution of Kentucky

By the Constitution of Kentucky, Sec. 6, it is ordered that "All elections shall be free and equal."

The Court of Appeals of Kentucky has construed this section in the following cases, and has held that elections

at which a large number of voters did not have power to vote, were not free and equal, within the meaning of the Constitutional provision, and were therefore void.

Hocker v. *Pendleton*, 100 Ky. 726, 39 S. W. 250.
Walbrecht v. *Ingram*, 164 Ky. 463, 175 S. W. 1022.
Early v. *Raines*, 121 Ky. 439, 89 S. W. 289.
Robertson v. *Hopkins County*, 248 Ky. 370, 58 S. W. (2d) 621.

And in the case last cited the Court held that where voters were under either civil or military restraint, an election held in their absence was not free and equal.

(C) The Effect of the Construction Given Sec. 6, of the Kentucky Constitution by the Court of Appeals of Kentucky.

The effect of Sec. 6, Ky. Const. supra, and the construction of it by the Court of Appeals in the cases supra, is to erect that section, and the construction of it, and its application, a part of the law of the land, in the State of Kentucky. As a part of the law of the land, it provides due process, and is protected by the Fourteenth Amendment to the United States Constitution against infringement by Kentucky.

(D) The Constitutioinal and Statutory Provsions of Kentucky, on Which Appellants' Rights Are Founded

By Sec. 145 Ky. Const. the qualifications of voters in that State are defined. Appellants are thus qualified.

By Sec. 117.010 Kentucky Revised Statutes it is provided that all persons, male and female, possessing the qualifications provided by Sec. 145 Ky. Const. Supra, shall have the right to vote in Kentucky, in the precincts where they reside and are registered. Appellants reside and are registered in various precincts in Johnson County.

Plaintiffs-Appellants, contend that by these Constitutional and statutory provisions, Kentucky has clothed each one of them, and each one for whose benefit they sue, with a vested civil right, which is entitled to the protection of the Courts, and especially to the protection of the Supreme Court of the United States under the Fourteenth Amendment.

It is also their contention, that an election, submitting to the voters of a locality, a purely aesthetic question, and having for its object the establishment of a way or system of life, held while a large group of voters, whose votes if cast could decide the issue differently, are involuntarily absent from the locality, is, as to those absent voters, a denial of the equal protection of the laws, in contravention of the Fourteenth Amendment.

(E) Analogous Cases in the Supreme Court

Plaintiffs-appellants believe that certain cases heretofore determined by the Supreme Court of the United States, support their claim that that Court has jurisdiction of the question here made:

Nixon v. *Herndon*, 273 U. S. 536, 47 Sup. Ct. Rep. 446, 71 L. Ed. 759.

Nixon v. *Condon*, 286 U. S. 73, 52 Sup. Ct. Rep. 484, 76 L. Ed. 984.

Lane v. *Wilson*, 307 U. S. 274, 59 Sup. Ct. Rep. 875, 83 L. Ed. 1287.

Coleman v. *Miller*, 307 U. S. 469, 59 Sup. Ct. Rep. 989, 83 L. Ed. 1404.

United States v. *Classic*, 313 U. S. 323, 61 Sup. Ct. Rep. 1041, 85 L. Ed. 1382.

On the basis of those decisions, plaintiffs-appellants believe that if the denial of the ballot to colored voters is a denial of due process and equal protection, as to them,

then the same denial to soldiers, fighting for the preservation of all free rights including the right to select officials, and settle submitted questions, is a denial of due process and equal protection to them.

(F) The Force of Karloftis v. Helton, — U. S. —, — Sup. Ct. Rep. —, 88 L. Ed. 1171

Karloftis v. *Helton, supra,* is of no force here. In that case the petition failed to disclose the number of absentee soldiers, or that enough persons were absent to have changed the result of the election, had they been present and voting.

Here the absentees were more than double the majority obtained by the "Drys."

Respectfully submitted,

(Signed) CLEON K. CALVERT,
Attorney for Plaintiffs-Appellants.

APPENDIX "A"

COURT OF APPEALS OF KENTUCKY

(November 3, 1944)

MITCHELL CANTRELL, ET AL., *Appellants,*

vs.

LESTER ADAMS, ET AL., ETC., *Appellee*

Appeal from Johnson Circuit Court. J. F. Bailey, Judge

Opinion of the Court by Judge Sims. Affirming

Seven legally qualified voters of Johnson County brought this action under KRS 242.120 against the election commissioners of that county to contest a local option election held on May 8, 1944. A demurrer was sustained to the petition and upon plaintiffs' declination to plead further, their petition was dismissed and they appeal.

The petition sets out but one ground for contest; that at the time the election was held 2714 "dry" and 1401 "wet" ballots were cast and that there were 2700 legal voters, including plaintiffs, involuntarily absent from Johnson County in the armed forces of the United States who were without power to cast their votes. That a militant minority of the voters in the county took advantage of the enforced absence of these 2700 voters and fraudulently called the el-ction, well-knowing that the provisions of the State Constitution prohibited absentee voting in local option elections and they thereby violated Section 6 and Section 145 of the Kentucky Constitution, and the Fifth and Fourteenth Amendments of the Federal Constitution in calling the election when 2700 voters were involuntarily out of the county.

Section 145 of the Kentucky Constitution gives the qualifications of legal voters, and Section 6 thereof provides that all elections shall be free and equal. The Fifth and Fourteenth Amendments of the Federal Constitution guarantee equal protection and due process of law to all citizens.

The brief filed for plaintiffs asserts that the question presented here is different from the first one presented in Karloftis v. Helton, 297 Ky. 463, 178 S. W. (2d) 959, but it fails to tell us wherein the difference lies. In addition to stating in the Helton opinion that no member of the armed forces of our country was prohibited from voting in a local option election, or was deprived of the right of suffrage by reason of any inability to be present at the polls on account of being in the service, it was said:

> "To uphold the first contention would be to declare that all elections for all purposes in times of war should cease, and that the civil government of the United States and the Commonwealth should no longer continue to function. Such was not the purpose of the framers of either the Constitution of the Commonwealth of Kentucky or the Constitution of the United States."

Plaintiffs criticize the quoted language from the Helton opinion on the theory that while it might be applicable to an election concerning the selection of governmental officers it has no application to the social, moral or economic question of whether or not intoxicating beverages should be sold in a county. Section 61 of our Constitution permits the Legislature to provide for taking the sense of the voters on the question of the sale of intoxicating beverages in a county, and we can see no reason why what was said in the Helton opinion should not apply with the same force to a local option election as it does to one where governmental officers are chosen.

Appellants seize on this expression in Hall v. Marshall, 80 Ky. 552, 557, 4 Ky. L. R. 502:

> "There is a marked distinction between elections for public officers and elections held under legislative sanction upon matters affecting local interest, such as votes for and against local option, the removal and location of county seats, and even upon the question of local taxation."

Judge Pryor there was speaking with reference to the Legislature's authority to make provision as to the manner in

which such local elections should be held and how the votes cast should be canvassed or the returns counted. He did not say that citizens who were absent at the time local option elections were held had any higher or more sacred right to vote in such elections than in one at which governmental officers were selected.

The opinion in Karloftis v. Helton, 297 Ky. 463, 178 S. W. (2d) 959, further held there was no violation of the Fifth and Fourteenth Amendments of the Federal Constitution by that local option election, and as the United States Supreme Court refused to grant certiorari (88 L. Ed. 1171) it is not necessary here to further pursue that question.

The judgment is affirmed.

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Attorneys for Appellants.

W. R. PRATER,
Salyersville, Kentucky,
Attorney for Appellee.

DECISIONS PER CURIAM, ETC., FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.*

No. 830. CANTRELL ET AL. *v.* ADAMS ET AL. Appeal from the Court of Appeals of Kentucky. February 5, 1945. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Mr. Cleon K. Calvert* for appellants. Reported below: 298 Ky. 845, 183 S. W. 2d 492.